

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: )

LUMINANT GENERATION COMPANY - )  
SANDOW 5 GENERATING PLANT, )  
NEAR ROCKDALE, MILAM COUNTY, TEXAS )

PERMIT NUMBER: O3025 )

ISSUED BY TEXAS COMMISSION ON )  
ENVIRONMENTAL QUALITY ON )  
AUGUST 18, 2011 )

ORDER RESPONDING TO )  
PETITIONERS' REQUEST )  
THAT THE )  
ADMINISTRATOR )  
OBJECT TO THE )  
ISSUANCE OF A TITLE V )  
OPERATING PERMIT )

Petition Number VI-2011-05

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

**I. INTRODUCTION**

On October 5, 2011, the United States Environmental Protection Agency (EPA) received a petition from Environmental Integrity Project (EIP), Sierra Club, Public Citizen, Texas Campaign for the Environment, Environment Texas, and the SEED Coalition (Petitioners) pursuant to section 505(b)(2) of the Clean Air Act (Act or CAA), 42 U.S.C. §7661d(b)(2), 40 C.F.R. §70.8(d), and 30 Texas Administrative Code (TAC) 122.360. The petition requests that the EPA object to the title V operating permit issued by the Texas Commission on Environmental Quality (TCEQ) on August 18, 2011, to Luminant Generation Company – Sandow 5 Generating Plant (“Sandow 5”) located near Rockdale, Milam County, Texas. In the alternative, the Petitioners petition the EPA to reopen the Permit to correct its alleged deficiencies and assure compliance with all applicable requirements of the CAA.<sup>1</sup> The Petitioners base this petition on comments filed by the EIP with the TCEQ on August 3, 2009, during the public comment period on the draft permit.

The Petitioners have requested that the Administrator object to the Sandow 5 title V permit because the Petitioners allege that the permit does not comply with the CAA and implementing regulations at 40 C.F.R. Part 70 for four main reasons. These four overarching contentions are: (1) the Sandow 5 title V permit impermissibly incorporates

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<sup>1</sup> The EPA acknowledges Petitioners' alternative request in the petition that the EPA reopen the permit for cause. Petition at I. The EPA is not responding to the alternative request in this Order. This Order only responds to the Petitioners' request for the EPA to object to the permit pursuant to CAA 505(b)(2).

by reference emission limitations established in a major New Source Review (NSR) permit; (2) the Sandow 5 title V permit impermissibly incorporates by reference the EPA-disapproved Pollution Control Project (PCP) Standard Permit (SP); (3) the permit impermissibly incorporates permits by rule (PBRs) (this claim is divided into 7 sub-claims); and (4) the permit lacks a Maximum Achievable Control Technology (MACT) determination as required by CAA section 112(g).

In considering the allegations made by the Petitioners, the EPA reviewed several documents, including the title V operating permit (Permit O3025), the statement of basis, public comments on the draft permit, the TCEQ Executive Director's response to public comments (TCEQ Response to Comments (RTC)) dated June 15, 2011, certain NSR and PBR permits that are incorporated by reference into the title V permit for this facility, the State Implementation Plan (SIP) approved Texas regulations governing permits by rule for air emissions, and Luminant's Comments Concerning the Petitioners' Petition For Objection to U.S. Environmental Protection Agency dated February 29, 2012. Based on a review of all of the information before me, and for reasons detailed in this order, I deny the petition requesting that the EPA object to Sandow 5 title V permit No. O3025.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to the EPA an operating permit program intended to meet the requirements of CAA title V. The EPA granted interim approval to Texas for the title V (Part 70) operating program on June 25, 1996. 61 Fed. Reg. 32693. The EPA granted full approval to Texas's operating permit program on December 6, 2001. 66 Fed. Reg. 66318. The EPA-approved program is found in 30 TAC Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable SIP. *See* CAA § 502(a) and 504(a), 42 U.S.C. § 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (the EPA final action promulgating Part 70 rule). One purpose of the title V program is to "enable the source, states, the EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permits program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under CAA section 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the

EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under 40 C.F.R. Part 70. 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 C.F.R. §70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316,333 n.11 (2d Cir. 2003). Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670,677-78 (7th Cir. 200.8); *Sierra Club v. EPA*, 557 F.3d 401,406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comment. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) - (ii), and 40 C.F.R. § 70.8(d).

### **III. BACKGROUND**

#### **A. The Facility**

The Sandow 5 facility is located 9 miles southwest of Rockdale on FM 1786; 3986 Charles Martin Hall Road in Milam County, Texas. Sandow 5 is a steam-electric utility generating facility using two circulating fluidized bed (CFB) boilers. Each of the steam generators provides steam to a common turbine generator set capable of generating approximately 575 megawatts (net). The two CFB boilers combust coal within an air-suspended mass (i.e., fluidized bed) of particles. Each boiler is equipped with fuel oil-fired burners that are used primarily for combustion support or during startup, shutdown, and malfunctions.

#### **B. The Permit**

Luminant operates the Sandow Creek Steam Electric Station (SES) located near Rockdale, Milam County, Texas. Luminant, formerly TXU, purchased Alcoa's replacement CFB project in Rockdale and renamed it Sandow 5. The CFB project is the outcome of an enforcement action taken by the EPA and a citizens group, Neighbors for

Neighbors, regarding modifications Alcoa made in the mid-1980s to their 1954-vintage electric generating units, Sandow 1-3. Along with the purchase, Luminant took over the consent decree that the project is subject to as part of a court order allowing the purchase.

Luminant submitted a title V permit application for its Sandow 5 Generating Plant to TCEQ on May 1, 2009. TCEQ published a notice of the proposed title V permit on July 2, 2009. EIP (one of the Petitioners) submitted comments during the public comment period on the draft operating permit on August 3, 2009. TCEQ proposed the permit to the EPA on June 15, 2011, with the revised permit and RTC document via an email to the EPA. On June 15, 2011, the draft revised permit and RTC were officially mailed to EIP, Luminant, and the EPA. The permit was modified in response to comments originally received from EIP on August 3, 2009. The EPA did not object to the draft revised permit. On August 18, 2011, TCEQ issued the permit to Luminant pursuant to state regulatory provisions implementing the Act, 42 U.S.C. §§ 7401, *et seq.* The title V permit incorporates applicable requirements of a minor NSR SIP permit for the two CFB boilers associated with the consent decree and other minor NSR SIP PBRs for Luminant's Sandow 5 plant. Luminant is located in an area that is currently designated as attainment or unclassifiable for all National Ambient Air Quality Standards (NAAQS).

The Luminant title V permit lists ten Texas PBRs that are incorporated by reference into the operating permit and are enforceable under it.<sup>2,3</sup> PBRs are issued and modified by TCEQ pursuant to the process codified at 30 TAC Chapter 106, Subchapter A. The EPA approved Subchapter A into the Texas NSR SIP on November 14, 2003. 68 Fed. Reg. 64545. Chapter 106 PBRs adopted and modified pursuant to Subchapter A provide an alternative permitting process for approving the construction of new and modified facilities or changes within facilities that TCEQ has determined will not make a significant contribution of air contaminants to the atmosphere. These regulatory PBRs provide a streamlined NSR SIP permitting mechanism for certain small sources to rely upon rather than obtaining a case-by-case minor NSR permit.

#### **IV. THRESHOLD REQUIREMENTS**

Section 505(b)(2) of the Act provides that a person may petition the Administrator of the EPA, within 60 days after expiration of the EPA's 45-day review period, to object to the

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<sup>2</sup> See 66 Fed. Reg. 63318, 63324 (Dec. 6, 2001).

<sup>3</sup> *In the Matter of CITGO Refining and Chemicals Company L.P. West Plant, Corpus Christi, Texas, Petition Number VI-2007-01* (May 28, 2009) (CITGO Order), EPA stated that

As to Texas' use of incorporation by reference for emissions limitations in minor NSR permits and permits by rule, EPA will be evaluating this practice to determine how well it is working. Further, while EPA approved of the incorporation by reference approach for these types of permits, as discussed in a separate title V order issued today (In the Matter of the Premcor Refining Group, Inc. Port Arthur, Texas, Petition VI-2007-02 (May 28, 2009)) it is important that that TCEQ ensure that referenced permits are part of the public docket or otherwise readily available, and currently applicable, and that the title V permit is clear and unambiguous as to how the emissions limits apply to particular emissions units.

CITGO Order at 11-12.

issuance of a proposed permit. TCEQ proposed the permit to the EPA on June 15, 2011. The EPA's 45-day review period for the Luminant title V permit expired on August 5, 2011, and the revised 60-day petition period began on August 6, 2011. Thus, the 60-day petition period ended on October 5, 2011. The subject petition is dated October 4, 2011. The EPA finds that the Petitioners timely filed their petition.

## V. ISSUES RAISED BY THE PETITIONERS

As an initial matter, as discussed below, the EPA finds that the comments submitted to TCEQ during the public comment period did not raise petition claims 1, 2, 3B, 3C, 3D, 3E, 3F (in part), 3G, and 4 with reasonable specificity, as required by 505(b)(2) of the Act and 40 C.F.R. § 70.8(d). In addition, Petitioners have not demonstrated that it was impracticable to raise such objections at that time, and there is no basis for finding that grounds for such objection arose later.<sup>4</sup> As the EPA stated in the proposal to the original title V regulations:

The EPA believes that Congress did not intend for Petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address. Accordingly, the Agency believes that the requirement to raise issues "with reasonable specificity" places a burden on the Petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act.

56 Fed. Reg. 21712, 21750 (1991). Thus, a title V petition should not be used to raise issues to the EPA that the State has had no opportunity to address, and the requirement to raise issues "with reasonable specificity" places a burden on the petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act. *Id.* In sum, the comments did not present evidence or analysis to support these claims in the petition, and thus TCEQ had no opportunity to consider and respond to those claims. The Petitioners cannot raise these claims now.

It is important to note that the decision set forth in this order is made, as it should be, specifically within the legal standards that apply to petitions under CAA section 505(b)(2), and with specific reference to the permit and petition in question. While some of the issues raised in the petition are similar to issues the EPA has raised with Texas in the context of concerns with its SIP and title V programs, the Petitioners here must nevertheless meet the burden placed on all petitioners by the title V regulations and the CAA. The EPA and TCEQ have had ongoing dialogue about TCEQ's use of incorporation by reference to ensure that title V permits are clear and unambiguous, as they relate to assuring compliance with both major and minor NSR applicable requirements. The EPA intends to conduct further dialogue with the TCEQ on these matters.

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<sup>4</sup> The Petitioners' comments on this permit were the only comments received by TCEQ for this permit, and therefore comprise the sole record in determining whether an issue was raised with reasonable specificity during the comment period.

**Claim 1: The Sandow 5 Title V Permit Impermissibly Incorporates by Reference Emission Limitations Established in a Major NSR Permit.**

**Petitioners' Claim:** The Petitioners claim generally that “[t]he Permit’s use of incorporation by reference poses a significant barrier to enforcement of applicable requirements insofar as it is extremely difficult to determine the emissions limits, monitoring, and recordkeeping requirements applicable to the Sandow 5 Plant.” Petition at 3. The Petitioners state that the EPA has explicitly and repeatedly disapproved Texas’ use of incorporation by reference of emission limitations and standards, other than minor NSR permits and permits by rule. Petition at 4. To support their argument, the Petitioners cite the CITGO Order as well as other previous statements made by the EPA referring to the EPA’s position on Texas’s use of IBR in permits. Specifically, the Petitioners claim that “the Permit impermissibly incorporates by reference the emissions limitations established by Luminant’s NSR permit for the Sandow 5 facility, Permit No. 48437.” Petition at 5. In a footnote, the Petitioners claim that Permit No. 48437 is a major NSR permit, although they also acknowledge that the permit “is not a PSD permit.”<sup>5</sup>

**EPA’s Response:** I deny the Petitioners’ request for an objection to the permit on this claim. This issue was not raised with reasonable specificity during the public comment period, as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d) and the Petitioners have not demonstrated that it was impracticable to raise such objections at that time, and there is no basis for finding that grounds for such objection arose later. Nowhere did the public comment letter expressly claim that the Permit No. 48437 at issue was truly a major NSR permit. Thus, Petitioners presented no evidence or analysis to TCEQ during the public comment demonstrating that the permit impermissibly incorporates by reference emissions limitations established by a major NSR permit for the Sandow 5 facility. Although petitioners now cite Permit No. 48437 and claim it was a major source permit, they did not even mention that permit in the public comments submitted to TCEQ on the draft permit on August 3, 2009, and said nothing to alert TCEQ that Petitioners would later claim that it was a major source permit. Thus they cannot raise this claim now.

I also note, however, that TCEQ’s response to the associated public comments stated that the EPA has approved TCEQ’s use of IBR for both minor *and* major NSR. This is incorrect. The EPA has not approved TCEQ’s use of IBR for emissions limitations from

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<sup>5</sup> The Petitioners assert:

*See* New Source Authorization References, Permit at 59. Permit No. 48437 is not a PSD permit, but it is nonetheless a major NSR permit. The permit authorized construction of two new CFB boilers to replace three grandfathered 1954-vintage lignite boilers at the site. Because the project resulted in decreased emissions, it was not treated as a major modification. According to the Maximum Authorized Emission Rate Table for Permit No. 48437, each of Sandow 5’s two CFB boilers may emit 1,296 tpy of NO<sub>x</sub>, 1,945 tpy SO<sub>2</sub>, 1,296 tpy of CO, 194 tpy of PM/PM<sub>10</sub>, 66 tpy of VOC, and 0.048 tpy of mercury.

Petition at 5 n15.

major NSR permits.

**Claim 2: The Sandow 5 Title V Permit Impermissibly Incorporates by Reference an EPA-disapproved Pollution Control Project Standard Permit.**

**Petitioners' Claim:** The Petitioners assert that “[o]n September 15, 2010, EPA disapproved Texas’ submitted Standard Permit for Pollution Control Projects because it does not meet the requirements of the Clean Air Act for a minor NSR Standard Permit program.” Petition at 5. The Petitioners further assert that because the EPA disapproved the Standard Permit for PCP SP, PCP projects must be authorized through the Texas minor NSR program. Petition at 6. The Petitioners allege that TCEQ incorporated by reference Permit No 83346, which is a PCP SP registration for the Flue Gas Desulfurization (FGD) and sorbent injection on Sandow 5 CFB, into Luminant’s title V permit. *Id.* The Petitioners conclude that “[b]ecause the Permit incorporates by reference Texas’ disapproved Pollution Control Project Standard Permit, EPA must object to it and require Luminant to obtain a SIP-approved authorization for actual emissions increases resulting from the Sandow 5 FGD vessel, sorbent injection, and related storage facilities.” *Id.*

**EPA’s Response:** I deny the Petitioners’ request for an objection to the permit on this claim. The Petitioners concede that these objections were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). The Petitioners, however, claim that they “could not have objected to the draft permit’s incorporation of a disapproved PCP SP during the public comment period” because TCEQ’s PCP SP submitted to the EPA for approval into the Texas SIP was not disapproved by the EPA until after the public comment period closed.<sup>6</sup>

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<sup>6</sup> The Pollution Control Project Standard Permit rule was submitted to EPA for SIP approval on February 1, 2006. The public comment period for the Sandow 5 title V permit was open July 2, 2009, through August 2, 2009. The EPA took action on this submission on September 15, 2010, *see* 75 Fed. Reg. 56,427.

The Petitioners state:

This issue was not raised during the comment period. However, it is proper for Petitioners to raise it here for the first time. According to 30 Tex. Admin. Code § 122.360(f), ‘Petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period, or that the grounds for the objection arose after the public comment period.’ EPA did not disapprove Texas’ Pollution Control Project Standard Permit until September 15, 2010. The public comment period for the draft permit ended, on August 3, 2009. Thus, Petitioners could not have objected to the Draft Permit’s incorporation of a disapproved Pollution Control Project Standard Permit during the public comment period.

Petition at 6-7 n. 26

However, the substance of the Petitioners' objection is that it was improper to include a non-SIP approved provision into the permit, and they are raising that issue in Claim 3F, discussed more fully below. The EPA had neither approved nor disapproved TCEQ's submission of the PCP SP at the time of the public comment period and therefore it was not part of the SIP. And the EPA has recognized that the obligation to raise an issue extends to claims that are "readily ascertainable" during the comment period. *See In the Matter of Public Service Co. of Colorado dba Excel Energy, Hayden Station*, Petition No. VIII-2009-01 (March 24, 2010) at 12. The fact that the PCP standard permit was not SIP-approved was readily ascertainable during the comment period. Thus, the Petitioners could have raised their objection to the inclusion of a non-SIP provision in the permit in their public comments to TCEQ. Therefore, I find that, with respect to the Petitioners' claim of impermissible incorporation of a non-SIP approved PCP SP into the Sandow 5 title V permit, the Petitioners could have raised it in their public comments and failed to do so. Accordingly, they have not met the procedural requirements of CAA Section 505(b)(2) and 40 C.F.R. § 70.8(d) and this objection must be denied.<sup>7</sup>

### **Claim 3: The Permit Impermissibly Incorporates PBRs.**

The third objection to the Sandow 5 title V permit raised by the Petitioners is to the incorporation by reference of PBRs throughout the permit. They claim that the manner in which PBRs are incorporated in the permit makes it impossible to identify how many PBR authorizations are being incorporated in the permit, or to determine which emission limits are included. Moreover, the Petitioners contend that the incorporation of PBRs in the Luminant Permit is confusing and fails to adequately set forth the emission limits established by the incorporated PBRs and that it is impossible to determine whether the "aggregate limitations for all PBRs established by 30 TAC 106.4(a)(4)" are applicable to the Sandow 5 Plant. Petitioners also criticize PBRs as not consistent with the SIP or the Act. Claim 3 of the Petition includes seven subparts (3A-G) alleging specific claims that the IBR of PBR authorizations is defective. Each of these subparts is addressed in turn.

#### **3A. The IBR of minor NSR permits, including PBR authorizations, results in title V permits that are defective because they are practicably unenforceable**

***Petitioners' Claim:*** The Petitioners claim that "the practice of incorporating permit by rule authorizations into title V permits is confusing, provides insufficient information, and fails to assure compliance with the applicable requirements, including emission limits, of those PBR authorizations." Petition at 7. The Petitioners further allege that "EPA has acknowledged that the Commission's practice of incorporating PBR authorizations by reference into title V permits is contributing to 'ambiguous' and 'unenforceable' title V permits." *Id.* In support of this claim, the Petitioners cite to a June 10, 2010, letter from then EPA Region 6 Regional Administrator Al Armendariz to the Executive Director of the TCEQ concerning the use of IBR of minor NSR and PBRs

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<sup>7</sup> Further, even if EPA's disapproval of the PCP SP could be viewed as a grounds arising after under CAA section 505(b)(2), EPA's disapproval has been vacated by the United States Court of Appeals for the 5<sup>th</sup> Circuit. *Luminant Generation Co., LLC. v. EPA*, 675 F.3d 917 (Fifth Cir. 2012)



in title V permits. The Petitioners cite portions of this letter, including an acknowledgment of “continuing concerns that the exclusion of emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements on the face of the title V permit by the use of IBR of Minor NSR and PBRs is contributing to ambiguous, unenforceable title V permits.” *Id.* The Petitioners further cite to the statement in the EPA’s letter that “we believe the above identified problems should be corrected in your permitting process immediately and would be happy to work with you.” *Id.* The Petitioners state that “[t]he Commission has not undertaken any serious action to resolve the EPA’s concerns or to correct problems with its PBR program.” *Id.* Finally, the Petitioners allege that the Sandow permit’s “use of incorporation by reference for PBR authorizations is confusing, incomplete, misleading, and fails to list and assure compliance with emissions limits arising from PBR authorizations at the Sandow 5 power plant.” *Id.* Petition at 8.

***EPA’s Response:*** I deny the Petitioners’ request for an objection to the permit on this claim on the basis that the Petitioners have not demonstrated that the permit fails to assure compliance with the emission limits arising from PBR authorizations at Sandow 5. The Petitioners generally assert that the use of IBR for PBRs for the Sandow 5 permit is “confusing, incomplete, and misleading.” The EPA interprets the “demonstration” requirement in CAA section 505(b)(2) as placing the burden on the Petitioner to supply information to the EPA sufficient to demonstrate the validity of the objection raised to the title V permit. Petitioners’ general assertions that the use of IBR for PBRs is confusing, incomplete and misleading, and that the permit fails to list and assure compliance with emissions limits arising from PBR authorizations, do not meet that burden. The EPA has approved TCEQ’s use of IBR for minor NSR permits and PBRs, and this approval was upheld in the United States Court of Appeals for the 5<sup>th</sup> Circuit.<sup>8</sup> The IBR of PBR authorizations can be appropriate if implemented correctly, and the Petitioners have not demonstrated that there was improper implementation of the IBR of PBR authorizations in this case. In particular, the Petitioners have not demonstrated, as claimed, that TCEQ’s EPA-approved use of IBR for minor NSR requirements in Sandow’s title V permits, including for PBR authorizations, renders the title V permit practicably unenforceable. The PBRs are listed in the permit and their content is accessible to the public through TCEQ’s and the Texas Secretary of State’s websites. The permit identifies PBR authorizations that are applicable to individual emissions units and other PBR authorizations that are site-wide. These individual emission units and their applicable PBR authorizations are thus listed in the permit. Furthermore, as the Statement of Basis for the permit also explains, PBR authorizations that apply site-wide rather than to a specific unit are listed elsewhere in the permit.

To the extent that the Petitioners are claiming generally that the practice of incorporating PBR authorizations into title V permits issued by TCEQ fails to assure compliance with the requirements of those authorizations and emission limits, I deny the claim because, as noted above, the EPA has approved TCEQ’s use of IBR for PBRs. The EPA’s decision

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<sup>8</sup> 66 Fed. Reg. 63318, 63324 (Dec. 6, 2001); see also, *Public Citizen v. EPA*, 343 F.3d 449k, 460-61 (5<sup>th</sup> Cir. 2003)(upholding EPA’s approval of TCEQ’s use of incorporation by reference for minor NSR permits and Permits by Rule).

approving the use of IBR in Texas' program was limited to, and specific to, minor NSR permits and PBRs in Texas. The EPA noted the unique challenges Texas faced in integrating requirements from these permits into title V permits and we affirmed the limited use of IBR for PBRs. *See* the CITGO Order.

CAA section 505(b)(2) of the Act requires the Administrator to issue an objection if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirement of the Act. As noted in the CITGO Order, the EPA believes the use of IBR can be appropriate where the "title V permit is clear and unambiguous as to how the emissions limits apply to particular emission units." CITGO Order at 12, FN5. The Petitioners have not shown that use of IBR was improper in this case.

Further, to the extent that the issues raised in claims 3B-3G relate to this general claim, the EPA notes below that these issues were not raised with reasonable specificity in comments to TCEQ.<sup>9</sup>

**3B. IBR of PBRs is not sufficient to assure compliance with site-specific limits under 30 TAC 106.262 PBRs**

***Petitioners' Claim:*** The Petitioners assert that the emission limits under 30 TAC 106.262 require the use of certain site-specific factors. Petition at 10. Thus, the Petitioners assert, "one cannot determine the specific lb/hr limits that are incorporated by reference into the permit by looking at the text of 30 TAC 106.262." *Id.* The Petitioners conclude that "without additional information that is not contained in the permit, its Statement of Basis, and documents directly referenced by the permit, one cannot determine the hourly limit(s) that apply for at least some of the emissions units covered by the Permit." *Id.* The Petitioners argue that "[f]or this reason, the Permit fails to assure compliance with these emissions limits." *Id.*

***EPA's Response:*** I deny the Petitioners' request for an objection to the permit on this claim. These objections (to the extent they add anything to the objections in 3A just discussed) were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after that period. CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The public comments did not raise the specific claim cited in the petition, that the permit fails to assure compliance with the site-specific emission limits authorized under 106.262. Indeed, the Petitioners' public comments did not even mention concerns about emission limits calculated using site-specific factors under 30 TAC 106.262.

**3C. The IBR of minor NSR permits is defective because one cannot tell how many PBR authorizations cover an emissions unit**

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<sup>9</sup> Alternatively, the EPA finds that claim 3A was not raised with reasonable specificity because the comment to TCEQ on this issue, which was general and sweeping, had failed to adduce before the state the evidence that would support a finding of noncompliance with the Act. 56 Fed. Reg. at 21750.

***Petitioners' Claim:*** The Petitioners claim that 35 emission units are authorized under the PBRs in 30 TAC 106.262, but that the table on pages 59-62 of the Sandow title V permit “does not indicate whether all of these emission units are authorized under one or multiple 106.262 PBRs.” Petition at 11. The Petitioners allege that “In order to determine the emissions limits for each emissions unit covered by a PBR in the Permit, one must be able to figure out how many PBR authorizations under each Chapter 106 rule listed in the NSR Authorization References Table exist and which units are covered by each authorization.” *Id.* The Petitioners claim that “there is insufficient information included in the Permit and Statement of Basis to make these determinations.” Petitioners assert that “if one cannot determine what the emissions limits are for each emissions unit covered by the permit, the permit cannot assure compliance with those limits.” *Id.* The Petitioners conclude that “because the Permit does not assure compliance with limits established by PBR authorizations it incorporates by reference, the Permit fails to comply with the requirements of Title V.” *Id.*

***EPA's Response:*** I deny the Petitioners' request for an objection to the permit on this claim. These objections, which are very detailed and very specific, were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after the period. CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The Petitioners in this instance presented no argument or evidence or analysis to the TCEQ during the public comment period raising the specific claims they are now presenting. And they did not even mention in their public comments the claim they now make regarding determining the number of PBR authorizations for an emissions unit. Thus, TCEQ had no opportunity to consider and respond to the claims raised in the petition that this permit's IBR of minor NSR permits is defective because of the difficulty of determining which emission units are covered by which PBRs authorizations.

### **3D. The Permit Fails to Identify Emissions Units Associated with Certain PBRs.**

***Petitioners' Claim:*** The Petitioners allege that “the permit's NSR Authorization References table indicates that PBR permits have been issued to Sandow 5 pursuant to PBR [30 TAC] 106.144 (1997), 106.144 (2000), 106.227, 106.263, 106.371, 106.454, 106.472, 106.473, and 106.532.” Petition at 12. The Petitioners claim, however, that this table fails to identify any emissions unit at Sandow 5 authorized by any of these PBRs. *Id.* The Petitioners state that “[i]n order to assure compliance with PBR emissions limits, the Permit must, at the very least, indicate which emissions units are authorized under each PBR.” *Id.*

The Petitioners further assert that “[f]or many of these PBRs, it appears that no registration is required” *Id.* Thus, the Petitioners claim that “[i]f the Commission does not know which PBRs apply to which units at a particular facility, how can the Commission ensure compliance with the requirements of these federally enforceable authorizations?” Petitioners assert that “the Permit's failure to indicate which units are authorized under

the above-cited PBRs renders the permit ambiguous and confusing.” *Id.*

The Petitioners further contend that “both versions of PBR rule 106.144 incorporated by reference by the Permit require registration using Form PI-7 and approval by the Executive Director prior to construction.” Petitioners assert that, “[b]ecause projects authorized by 106.144 PBRs must be registered and approved by the Executive Director prior to construction, information about which units are authorized under these PBRs should be available to the Executive Director.” Thus, according to the Petitioners, “there is no reason that this information should not be included in the Permit.” *Id.*

***EPA’s Response:*** I deny the Petitioners’ request for an objection to the permit on this claim. These very specific and detailed objections were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after the period. CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The Petitioners in this instance presented no evidence or analysis to TCEQ during the public comment period that TCEQ could consider and respond to relating to whether the permit fails to identify emissions units authorized by nine PBRs. The extent to which the Petitioners mentioned the PBRs listed in the New Source Review Authorization References Table in the permit is captured by the following sentence: “The draft permit incorporates a dozen permit by rule (PBR) authorizations, the text of which appear nowhere in the draft renewal or its statement of basis. *See* the New Source Review Authorization References Table on Draft p. 59, incorporating among others, PBRs 101.261, 101.262 and 101.263.”<sup>10</sup> Public Comments on the Proposed Operating Permit for Luminant Generation Company LLC’s Sandow 5 Generating Plant, Proposed Permit No. 03025 at 2. The Petitioners did not so much as mention a concern with identifying emission units with respect to these PBRs. Therefore, the Petitioners did not raise this issue with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d).

**3E. The Permit Fails to Assure Compliance with the PBRs in 30 TAC rule 106.4(a)(4)**

***Petitioners’ Claim:*** The Petitioners state that according to 30 TAC 106.4(a)(4):

“ Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO<sub>x</sub>; or 25 tpy of VOC or SO<sub>2</sub> or PM; or 15 tpy of PM<sub>10</sub>; or 10 tpy of PM<sub>2.5</sub>; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen.”

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<sup>10</sup> The EPA assumes the Petitioners are referring to 30 TAC 106.261, 106.262, and 106.263, which are PBRs in Subchapter K of the state’s regulations.

Petition at 13. The Petitioners claim that “no facility at the Sandow 5 account has been subject to public notification and comment as required by Subchapters B and D.” *Id.* The Petitioners assert that the only public notice regarding facilities at Sandow 5 was pursuant to an enforcement agreement and that such notice is not adequate for purposes of the rule. *Id.* Therefore, the Petitioners claim the emission limits in 30 TAC 106.4(a)(4) apply. The Petitioners claim that, as the Sandow title V permit does not contain these emission limits, the “Permit may not adequately identify and assure compliance with all federally enforceable emissions limits.” *Id.*

***EPA’s Response:*** I deny the Petitioners’ request for an objection to the permit on this claim. This very detailed claim, which is explicitly focused on 30 TAC 106.4(a)(4), was not raised with reasonable specificity in comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d) (and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after such period). CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The Petitioners never even mentioned PBR rule 30 TAC 106.4(a)(4) in the public comments they submitted to TCEQ on the draft permit on August 3, 2009. They made only a passing statement that “the public is not given an adequate opportunity to comment when PBR rules are issued,” in advancing the broader argument, discussed elsewhere in this order, PBRs are not detailed enough to be enforceable. The Petitioners presented no evidence or analysis during the public comment period for TCEQ to consider and respond to regarding whether the PBR rule 106.4(a)(4) limits do not apply because there was a public notification for at least one unit.

### **3F. The Permit Incorporates Unenforceable General PBRs in Subchapter K of Chapter 106 that are not SIP approved**

***Petitioners’ Claim:*** The Petitioners claim that “the Subchapter K PBRs do not contain standardized control protocols” or “monitoring requirements.”<sup>11</sup> Petition at 15. The Petitioners also claim that “Luminant’s Title V Permit fails to indicate how compliance with emissions limits established by incorporated Subchapter K General PBRs will be demonstrated” and that “these emission limits are not enforceable as a practical matter.” *Id.*

The Petitioners further claim that Subchapter K PBRs fail to satisfy the requirements for State minor NSR programs in 40 C.F.R. Part 51 for several reasons. First, the Petitioners contend that “because the availability of Subchapter K permits is not limited to a narrowly defined class of sources there can be no adequate assurance that emissions from projects eligible for these permits will not result in a violation of applicable portion of the control strategy or interfere with attainment or maintenance of a national ambient air quality standard.” *Id.* Second, the Petitioners contend that the Subchapter K PBRs “fail to satisfy 40 C.F.R. 51.160(e), which provides that the SIP must identify the types and sizes of facilities that will be subject to review.” Petition at 15-16. Continuing their claims that the Subchapter K PBRs are inadequate, the Petitioners assert that “because the availability of Subchapter K PBRs is not limited to a narrowly defined category of

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<sup>11</sup> The Subchapter K PBRs are in 30 TAC 106.261-266.

sources” and because these PBRs “do not establish replicable generic conditions specifying how the Executive Director’s discretion is to be implemented for individual determinations” they are not adequate to ensure NAAQS compliance. They further assert that “these rules must expressly include a mechanism for pre-construction application and agency review for facilities that wish to operate under generic permits established by these rules.” Petition at 16. The Petitioners claim that “ [t]he Commission’s Subchapter K rules do not expressly include such a mechanism for preconstruction review and they do not lay out procedures for preventing construction of projects that will interfere with an applicable control strategy or the NAAQS. Thus, these rules are not approvable as part of the Texas SIP.” *Id.* The Petitioners allege that, as the Subchapter K PBRs “have not been approved as part of the Texas’ Minor NSR SIP, EPA should object to the Permit’s incorporation of Subchapter K PBRs.” Petition at 17.

***EPA’s Response:*** I deny the Petitioners’ request for an objection to the permit on this claim. Regarding the claim that Subchapter K PBRs are inconsistent with 40 C.F.R. Part 51 because they do not include preauthorization review of applications, fail to prevent construction of projects that will interfere with the NAAQS or applicable control strategy, fail to include adequate monitoring requirements and thus should not be incorporated by reference into the title V permit for Sandow, the EPA approved Subchapter A of 30 TAC chapter 106 into the Texas NSR SIP Subchapter A of 30 TAC chapter 106 on November 14, 2003. 68 Fed. Reg. 64545. Subchapter A contains the process by which TCEQ issues or modifies PBRs, and contains provisions that apply to all PBRs intended to ensure that individual PBRs meet the requirements of 40 C.F.R. Part 51. The Petitioners have not provided information to demonstrate that the Subchapter K PBRs were not issued or modified by TCEQ in compliance with the SIP-approved Subchapter A process. The EPA interprets the “demonstration” requirement in CAA section 505(b)(2) as placing the burden on the Petitioner to supply information to the EPA sufficient to demonstrate the validity of the objection raised to the title V permit. Petitioners’ general assertions that Subchapter K PBRs are inconsistent with 40 C.F.R. Part 51 because they do not include preauthorization review of applications, fail to prevent construction of projects that will interfere with the NAAQS or applicable control strategy, and fail to include adequate monitoring requirements, do not meet that procedural burden. Further, assertions that approved SIP procedures are not consistent with federal requirements are not appropriate for consideration in a title V petition. *See In the Matter of United States Steel Corporation – Granite City Works, Petition Number V-2001-2* (December 3, 2012) at 24, n. 15.

Furthermore, regarding the Petitioners’ allegations that Subchapter K PBRs fail to satisfy the requirements of 40 C.F.R. 51.160(e) because they are not limited to a narrowly defined class of sources nor do they identify the types and sizes of facilities that will be subject to review, I deny the Petitioners’ request for an objection to the permit on these claims. These objections were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period or that the grounds for such objection arose after the period. The public comments received did not allege whatsoever

that Subchapter K PBRs are not limited to narrowly defined classes of sources or do not identify the types and sizes of facilities that will be subject to review.

**3G. The Permit does not include monitoring requirements for IBR of PBR emission limits**

***Petitioners' Claim:*** The Petitioners assert that “the Subchapter K PBR rules listed in the New Source Authorization References table do not include any specific monitoring requirements for facilities authorized under those rules.” Petition at 17. The Petitioners further allege that “Neither does the Permit identify any specific monitoring requirements for limits established by the PBRs listed in the NSR Authorization References Table.” *Id.* The Petitioners therefore allege that the permit does not include monitoring requirements to assure compliance with the limits in the Subchapter K PBRs as required by title V, 40 C.F.R. 70.6(c)(1), and 30 TAC 122.142(c). Petition at 17.

***EPA's Response:*** I deny the Petitioners' request for an objection to the permit on this claim. These objections were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d) (and the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after the period). CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The Petitioners presented no evidence to the TCEQ during the public comment period that the Luminant Sandow 5 title V permit is not in compliance with the title V monitoring requirements of 40 C.F.R. 70.6(c)(1), and 30 TAC 122.142(c). The Petitioners did not make any specific claim in comments to TCEQ that the permit failed to include monitoring requirements to assure compliance for the emission limitations in the permit's Subchapter K PBR authorizations, as required by 40 C.F.R. 70.6(c)(1), and 30 TAC 122.142(c). Further, the Petitioners did not identify in their comments any actual problems with the monitoring in the Sandow 5 title V permit in relation to these applicable Subchapter K PBR requirements. Nor did the Petitioners raise the specific issue that the Sandow 5 title V permit does not identify any monitoring requirements for emission limits authorized under PBRs, including 30 TAC 106.261, 106.262, and 106.263.

It is true that one section of the public comments categorically argues at some length that all title V permits must include monitoring sufficient to assure compliance, but it does so without specifically mentioning PBRs. It is also true that another section broadly objecting to the use of IBR for PBRs includes a sentence asserting that the Texas PBR rules lack specific emission limits, adequate monitoring requirements, adequate reporting requirements, and includes compliance time frames “that violate prior EPA guidance and SIP approvals.” But the public comments did not specifically identify any problems with the monitoring requirements in the Sandow title V permit, or a need to supplement the monitoring in the permit in order to assure compliance with applicable PBRs for Part 70 purposes. In sum, the comments fall short of raising with reasonable specificity the claim that the permit does not include monitoring requirements to assure compliance with the limits in the Subchapter K PBRs as required by title V, 40 C.F.R. 70.6(c)(1), and 30 TAC 122.142(c).

#### **Issue 4: MACT Standard under Section 112(g) Applies to Sandow 5.**

***Petitioners' Claim:*** The Petitioners claim that the permit “does not assure compliance with the Clean Air Act’s Section 112 Maximum Available Control Technology (MACT) requirements applicable to Sandow 5.” Petition at 17. The Petitioners allege that while the Statement of Basis indicates that Sandow 5 is a major source of hazardous air pollutants that would fall under the stringent protective standards defined in section 112 of the Act, a MACT review has not been conducted for the Sandow 5 Plant. Petition at 18. The Petitioners state that the Sandow 5 facility is an electric utility steam generating unit (“EUSGU”) as defined by section 112 of the Act and the EPA has not yet promulgated final MACT standards for EUSGUs. The Petitioners further assert that “When the EPA fails to promulgate a MACT standard for a source category covered by section 112, any new major source of HAPs or modification to an existing covered source must undergo a ‘case-by-case’ MACT review.” *Id.* The Petitioners further allege that as there has been no MACT review, the Sandow 5 permit “does not assure compliance with the requirements of section 112 of the Clean Air Act as required by 42 U.S.C 7661c(a).” *Id.*

***EPA's Response:*** I deny the Petitioners' request for an objection to the permit on this claim. These objections were not raised with reasonable specificity in public comments as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). Further, the Petitioners did not demonstrate that it was impracticable to raise such objections within such period and I do not find that the grounds for such objection arose after the period. CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). Based on the comments submitted during the public comment period on the draft Sandow 5 title V permit, neither the Petitioners nor any other commenter raised objections to the permit based on an alleged failure to comply with the case-by-case Maximum Achievable Control Technology requirements of CAA 112(g). In fact, the Petitioners concede in the petition that “the issue was not raised during the comment period.”


Thus, I deny the petition with respect to the Petitioners' concerns that the permit “does not assure compliance with the CAA’s section 112 Maximum Available Control Technology (MACT) requirements” because it was not raised with reasonable specificity in comments.



**VI. CONCLUSION**

For the reasons set forth above and pursuant to CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the petition requesting that the EPA object to the title V permit O3025 issued to Luminant Generation Company for the Sandow 5 Generating Plant facility located in Milam County, Texas.

Dated: January 15, 2013

  
Lisa P. Jackson  
Administrator